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ALLIED EMPIRE PLANTATIONS SDN BHD

v.

CHIP LAM SENG BERHAD

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HIGH COURT MALAYA, IPOH
LEE SWEE SENG J
[COMPANIES WINDING-UP PETITION NO: 28-06-08-2012]
21 FEBRUARY 2014

C ***COMPANY LAW:*** *Winding up - Petition - Substitution of petitioning creditor - Application by assignee of debt and supporting creditor to substitute themselves as petitioners - Whether application should be allowed - Application of doctrine of relation back - Whether both applicants may be jointly substituted as petitioners - Companies (Winding-Up) Rules 1972, r. 33(1) - Companies Act 1965, ss. 219(2), 221*

D

The petitioner had, on 24 August 2012, filed a petition to wind-up the respondent for the sum of RM1,000,000 owing to it under a memorandum of agreement. Among other creditors who filed their notice of intention to support the petition was AmBank (M) Bhd ("AmBank"). The respondent's total exposure was in the region of RM486,920,974 owing to 11 banks. Some 33 unsecured trade creditors filed notices to oppose the petition. On 19 June 2013, the petitioner entered into a deed of assignment ('the deed') with Jadeline Ace Sdn Bhd ("Jadeline") wherein the petitioner's debt and all its rights, title and interest was absolutely assigned to Jadeline. Jadeline then applied (encl. 31) for an order pursuant to r. 33 of the Companies (Winding-up) Rules 1972 ('the Rules') read together with s. 221 of the Companies Act 1965 ('the Act') to have itself substituted as the petitioner to proceed with the petition accordingly. AmBank also applied (encl. 42) on 19 September 2013 to have itself substituted as the petitioner. Both Jadeline and AmBank claimed that they respectively had a better right than the other to obtain a substitution order in place of the petitioner and to proceed with the petition. The issues that arose were (i) whether both the applicants had a right to present the petition; and (ii) whether this right was to be determined at the point when the petition was first presented by the petitioner or at the point when the applicants sought to be substituted as the petitioner.

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Held (allowing both applications with no order as to costs): A

(1) Jadeline's right to be substituted as petitioner was derived from the deed, which was an absolute assignment within the meaning of s. 4(3) of the Civil Law Act 1956. Since the said debt had been absolutely assigned to Jadeline by the B petitioner, the effect under the law was that all rights to present the petition was with Jadeline. Jadeline would be vested with the full right to proceed with the petition. Even if it is doubtful if Jadeline had a right to apply for substitution under r. 32 of the Rules, one could also look at O. 15 r. 7(2) C of the Rules of Court 2012. (paras 12, 13 & 32)

(2) A winding-up order when granted would relate back to the date of filing of the petition under s. 219(2) of the Act. That seems to be the rationale behind the argument that under r. 33 of the Rules, the petitioner sought to be substituted D must have the right to present the petition as at the date of the first petition. Just as the relation back principle in a bankruptcy order does not prevent the substitution of an assignee for an assigned debt in a bankruptcy petition after an act of bankruptcy has been committed, the same principle E should not present any impediment to the substitution of an assignee for an assigned debt in a winding-up petition for it is the same debt that the respondent is being adjudicated a bankrupt or being sought to be wound-up. (paras 41 & 42) F

(3) At the time when Jadeline sought to be substituted as a petitioner on 20 June 2013, AmBank was more than capable and had the necessary *locus* to file a/the petition if it had wanted to; the presumption of the inability of the respondent to pay the debt having arisen after the expiry of three weeks G from the service of the said statutory notice under s. 218(1)(e) and (2)(a) of the Act which had been issued on 17 December 2012. Therefore, taking the relevant date as the date of applying for substitution by Jadeline on 20 June 2013, AmBank would more than qualify under r. 33 of the Rules for H by that time, AmBank had already been armed with a judgment of the court and the debt could no longer be a *bona fide* disputed debt. (paras 46 & 47)

(4) Both Jadeline and AmBank were allowed to be substituted as I petitioners in place of Allied Empire Plantations Sdn Bhd, the original petitioner. As the AmBank debt was much much bigger and as it was also a secured creditor, AmBank was to

take the lead where amendments of the petition were concerned. Ambank was to be named as the first petitioner and Jadeline as the second. (para 61)

Case(s) referred to:

Bank Industri & Teknologi Malaysia Bhd v. Alom Building Systems Sdn Bhd [2006] 3 CLJ 506 HC ***(refd)***

Fairview Schools Bhd v. Indrani Rajaratnam & Ors [1998] 1 CLJ 285 CA ***(refd)***

Lindeteves-Jacoberg (Malaya) Sdn Bhd v. Electrical Switchgears Automation (M) Sdn Bhd [1999] 6 CLJ 109 HC ***(refd)***

Mohamed Tawfik Tun Dr Ismail v. HLG Credit Sdn Bhd & Anor [2012] 2 CLJ 65 CA ***(refd)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***

Perak Pioneer Ltd v. Petroliam Nasional Bhd [1986] 1 AC 849 ***(refd)***

Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 HC ***(refd)***

Teoh Vin Sen v. True Creation Sdn Bhd [2008] 4 CLJ 393 HC ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, s. 50(1)
Bankruptcy Act 1967, s. 47(1)
Bankruptcy Rules 1969, r. 276
Civil Law Act 1956, s. 4(3)
Companies Act 1965, ss. 217, 218(1)(e), (2)(a), 219(2), 221
Companies (Winding-up) Rules 1972, rr. 32, 33
Rules of Court 2012, O. 15 r. 7(2)

Companies (Winding-up) Rules 1984 [HK], r. 33
Insolvency Rules 1986/1925 [UK], r. 4.19

For the petitioner - Eric Tan mentioning on behalf; M/s Jayadeep Hari & Jamil

For the respondent - Wong Rhen Yen (Colin Goonting & Carolyn Cheah with him); M/s Dennis Nik & Wong

For the supporting creditors - Eric Tan (Ong Siang Liang & Ahmad Ezmeel with him); M/s Ong Ma & Partners
- Anusha; M/s Anad & Noraini
- Claudiah Cheah; M/s Skrine
- Gary Xavier; M/s Kean Chye & Sivalingam
- Koh Yew Chong (Justin Leong with him); M/s Koh Yew Chong & Partners
- Evonne Phung (Mark La Brooy & S Y Hiew with her); M/s Raj Darryl & Loh

For opposing creditors - R Shanmugam; M/s Francis Pereira & Shan

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng J:

[1] The petitioner had filed a petition to wind-up the respondent on 24 August 2012. It was for the sum of RM1,000,000 owing to it by the respondent under a memorandum of agreement dated 20 January 2011 signed between the petitioner and the respondent. A s. 218 notice under the Companies Act 1965 was served on the respondent by leaving by hand the said notice on 11 July 2011 at its registered office requiring the respondent to pay the aforesaid debt within 21 days from the date of receipt of the said notice. The respondent had failed to do. Hence the petitioner filed the winding-up petition based on the presumption of the respondent's inability to pay its debt.

[2] Meanwhile the other creditors in the banks have filed their notice of intention to support the petition. They are AmBank (M) Bhd ("AmBank") (for a debt of RM36 million), Maybank (for a debt of RM200 million) and RHB (for a debt of RM47 million). In fact the total exposure is said to be in the region of RM486,920,974 owing to 11 banks. Then there are some 33 unsecured trade creditors who have filed a notice to oppose the petition.

Problem

[3] For reasons best known to the petitioner, it entered into a deed of assignment dated 19 June 2013 with Jadeline Ace Sdn Bhd ("Jadeline") wherein the petitioner's said debt and all its rights, title and interest was absolutely assigned to Jadeline. Jadeline now applied to have itself substituted as the petitioner to proceed with the petition accordingly.

[4] It does not look like Jadeline would be able to recover anything much from the winding-up exercise as the secured loans to the banks are not enough to be satisfied from the sale of the landed assets and business of the respondent in manufacturing and processing of rubber, latex and as an investment holding company. Maybe there is some strategic reason for wanting to so proceed.

[5] There is a buyer from Singapore in Halcyon Agri Ltd for RM63 million. A validation order has been granted for the purchase subject to terms.

[6] There is also another creditor, AmBank, which had also applied on 19 September 2013 to have itself substituted as the petitioner. It had extended various facilities to the respondent to the tune of about RM36 million. On 17 December 2012 it sent a s. 218 notice under the Companies Act 1965 to the respondent. In January 2013 it filed a writ action against the respondent for the USD1,630,944 facility and obtained summary judgment for the said sum on 24 October 2013. It stated that it did not file another winding-up petition for this judgment sum as there was already an existing winding-up petition filed by the petitioner.

[7] When both applications came up for hearing, one applicant was saying that it had a better right than the other to obtain a substitution order in place of the petitioner and to proceed with the petition!

Prayers

[8] Jadeline applied by way of a notice of motion (encl. 31) dated 20 June 2013 moving the court for an order pursuant to r. 33 of the Companies (Winding-up) Rules 1972 read with s. 221 of the Companies Act 1965 that:

(i) Jadeline Ace Sdn Bhd be substituted as the petitioner in place of the present petitioner and to proceed with the said petition;

(ii) Jadeline Ace Sdn Bhd be at liberty to apply to amend the petition.

[9] Meanwhile AmBank filed an application (encl. 42) on 19 September 2013 pursuant to r. 33 of the Companies (Winding-up) Rules 1972 and/or the inherent jurisdiction of the court, for an order that it, being a supporting creditor in the petition, be substituted as the petitioner.

Principles

[10] Rule 33 of the Companies (Winding-up) Rules 1972 reads as follows:

> 33. Substitution of any person as petitioner
>
> (1) When a petitioner is not entitled to present a petition or, whether so entitled or not, where he:

(a) fails to take all the steps prescribed by these Rules preliminary to the hearing of the petition;

(b) consents to withdraw his petition or to allow it to be dismissed or the hearing to be adjourned; or

(c) fails to appear in support of his petition when it is called on in Court on the day originally fixed for the hearing thereof or any day to which the hearing has been adjourned or if appearing does not apply for an order in terms of the prayer of his petition, the Court may upon such terms as it thinks just substitute as petitioner any person who, in the opinion of the Court, would have a right to present the petition and who is desirous of proceeding with the petition.

(2) An order to substitute a petitioner may, where a petitioner fails to advertise his petition within the time prescribed by or under these Rules or consents to withdraw his petition, be made by the Registrar or the Court at any time before the date fixed for the hearing of the petition.

[11] The question that arises is whether both the applicants would have a right to present the petition and is that to be determined at the point when the petition was first presented by the petitioner or at the point when the applicants sought to be substituted as the petitioner?

Whether Jadeline Should Be Substituted As Petitioner In The Circumstances Of The Case

[12] Jadeline's right to be substituted as petitioner is derived from the deed of assignment dated 11 June 2013 entered into between the petitioner and Jadeline after the petitioner had filed the petition. The deed of assignment was finally exhibited by Jadeline in its supplemental affidavit filed in support of its application after the court informed learned counsel, Mr Eric Tan, that an adverse inference shall be drawn against Jadeline if it does not produce the deed of assignment.

[13] It stated in the recital that the assignor who is the petitioner had presented a winding-up petition in the High Court at Ipoh *vide* Petition No: 28-60-08-2012 against the company (the respondent herein) for a debt of RM1,000,000 ("the debt") and the petition is pending in the court. It further stated that the

parties were desirous of entering into the deed of assignment to assign the debt pursuant to s. 4(3) of the Civil Law Act 1956. Under the heading in cl. 1.1 called "absolute assignment" it reads:

> 1.1 In consideration of a sum of RM800,000 ("the consideration") to be paid by the assignee in the manner hereinafter set out, the assignor assigns absolutely the debt to the assignee including the right to sue for recovery thereof, free of any interest, liabilities or obligations there under.

[14] Clause 2 reads as follows:

> 2. Substitution
>
> Upon execution of this Deed, the Assignee shall at its own costs apply to be substituted as the petitioner in place of the Assignor in the Winding-up Petition. Upon execution of this Deed, the Assignor shall execute the notice of assignment in the format as attached herewith in Schedule 1 to the Company.

[15] I am satisfied that the deed of assignment in question is an absolute assignment within the meaning of s. 4(3) of the Civil Law Act 1956 in that the requirements therein have been satisfied by the parties to the assignment. It reads as follows:

> Any absolute assignment, by **writing**, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which **express notice in writing has been given to the debtor**, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, **to pass and transfer the legal right to the debt or chose in action, from the date of the notice**, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. (emphasis added)

[16] The notice of assignment to the respondent debtor dated 19 June 2013 was exhibited as exh. CS-2 in the affidavit in support of Jadeline in encl. 38. There is no dispute from the respondent that it has received the said notice.

[17] Now the question then is this: would the applicant Jadeline have the right to present the petition at the time when the petitioner had presented the petition or is the test whether the

applicant would have the right to present a/the petition at the point when substitution as petitioner is made? The Privy Council case from Hong Kong in *Perak Pioneer Ltd v. Petroliam Nasional Bhd* [1986] 1 AC 849 wrestled with this issue and held that the relevant point in time is not when the petition was filed by the petitioner but when the substitution was sought to be made. Though it involved an appeal from the Court of Appeal in Hong Kong, the companies involved have links to Malaysia and indeed the assignee there is none other than Petroliam Nasional Bhd.

[18] In *Perak Pioneer Ltd* case, a finance company in Bumiputra Malaysia Finance Ltd ("the finance company") assigned to Bank Bumiputra Malaysia Bhd ("the bank") a sum of HK$887,000 owing to it by various Hong Kong companies including the appellant company. By a deed of assignment dated 31 December 1983 the finance company assigned to the bank the said sum and the securities held by it, as set out in the schedule to the deed. On 24 July 1984 the finance company and the bank presented a joint petition to the High Court to wind up the company under the provisions of the Hong Kong Companies Ordinance on the ground that it was insolvent and unable to pay its debts. The return date of the petition was 26 September 1984. What happened until the Court of Appeal of Hong Kong are was briefly narrated as follows at pp. 853-854:

> In the meantime an arrangement was made, with the concurrence of the Finance Minister of Malaysia, under which a Malaysian company called Petroliam Nasional Bhd ("the assignee") acquired a majority shareholding in the bank, and also purchased the Hong Kong indebtedness due to the bank under the 1983 assignment. The latter purchase was effected by a deed of assignment of 17 September 1984 whereby the bank assigned the benefit of the Hong Kong debts to the assignee, in consideration of the payment of a sum in Malaysian currency. *Thus the debt due from the company to the finance company became by the first assignment vested in the bank some seven months before the winding up petition was presented, and then became vested by the second assignment in the assignee some two months after the presentation of the petition.*
>
> On 19 September 1984 the company issued a notice of motion to strike out the petition as an abuse of the process of the court on the footing that the debt upon which the petition was based was *bona fide* disputed on substantial grounds. As a result the petition was adjourned pending a decision on the summons to strike out, which was still unheard when this appeal came before their Lordships.

> In January 1985 the finance company, the bank and the assignee made a joint application to the High Court for an order to join the assignee as an additional petitioner or alternatively to substitute the assignee as sole petitioner in the place of the finance company and the bank. The application came before Jones J. in April 1985. He refused to make the first order sought, but made an order for substitution under rule 33 of the Companies (Winding-up) Rules. *The petition was amended accordingly by striking out the names of the finance company and the bank as petitioners and substituting the name of the assignee as sole petitioner.* The company appealed. The appeal was dismissed in May, as a result of the majority decision of Cons and Fuad JJA, Kempster JA dissenting. The company now appeals to Her Majesty in Council. (emphasis added)

[19] It was thus clear that when the finance company and the bank jointly presented the winding-up petition they had every right to do so. However before the petition could be heard and two months after the presentation of the petition, the debt was assigned to the assignee and so the original petitioners are no longer entitled to present a petition. The Hong Kong r. 33 of the Companies (Winding-up) Rules 1984 is almost identical to r. 33 of the Malaysian Companies (Winding-up) Rules 1972 except for the substitution of the word "... would have a right to present a petition" instead of "... the petition." The Hong Kong r. 33 reads:

> When a petitioner is not entitled to present a petition or whether so entitled or not, where he (a) fails to advertise his petition ... or (b) consents to withdraw his petition, or to allow it to be dismissed, or the hearing adjourned, or fails to appear ... or (c) if appearing, does not apply for an order in the terms of the prayer of his petition, the court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who in the opinion of the court **would have a right to present a petition**, and who is desirous of prosecuting the petition. (emphasis added)

[20] The Privy Council set out its reasoning at pp. 858-859 as follows:

> The company's alternative submission is based on the wording of section 179 of the Companies Ordinance. The argument runs thus. As an application to the court for a winding up order must be by a petition presented by (among others) a creditor, it follows that the petitioner must sustain the status of a creditor at the date when the petition is presented. If the assignee is substituted for the finance company and the bank, the petition will have to be

amended by striking out the latter as petitioners and substituting the former. There will then exist a petition of a person who was not a creditor at the date of the presentation of the petition. This, it is said, contravenes section 179.

The answer to the argument is to be found in the wording of rule 33 of the Companies (Winding-up) Rules which Their Lordships have already set out. The court is entitled to substitute any creditor of the company as petitioner in certain defined circumstances. The conditions are these. First, one of certain specified events must have happened, i.e. (A) "when a petitioner is not entitled to present a petition," or (B) whether so entitled or not, he fails to advertise, or consents to withdrawal, or to dismissal, or to an adjournment, or fails to appear or does not apply for an order. If one of these events happens the court may substitute any other creditor provided that such creditor satisfies the required condition, i.e. (C) the creditor is a person "who in the opinion of the court would have a right to present a petition" and "who is desirous of prosecuting the petition." *Condition (A) presupposes that a petition has been presented (otherwise substitution could not arise), and that the petitioner is a person who "is not entitled to present a petition." That condition is expressed in the present tense. The court must therefore look at the position at the date when substitution is sought, and ask the question whether the petitioner for whom another person is proposed to be substituted is a person who is not entitled to present a petition. In the present case that condition was satisfied because, by reason of the second assignment, the finance company and the bank were not at the date when substitution was sought, persons who were entitled to present a petition.* One then turns to condition (C) to ascertain whether that condition also was satisfied. To answer that question, **the court must ask itself whether the assignee "would have a right to present a petition,"** not whether the assignee "would have had a right to present the petition." At the date when substitution was sought, the assignee had a right to present a winding up petition. It follows that on the plain wording of rule 33, **the court had jurisdiction to order the substitution of the assignee notwithstanding that the assignee was not a creditor at the date when the petition was presented**. (emphasis added)

[21] The Privy Council case above was followed in the case of *Lindeteves-Jacoberg (Malaya) Sdn Bhd v. Electrical Switchgears Automation (M) Sdn Bhd* [1999] 6 CLJ 109; [1999] 5 MLJ 530. There the original petitioner had wanted to withdraw the petition and the applicant wanted to be the substituted petitioner. The applicant Cutler-Hammer however had not served the statutory notice under s. 218(2)(a) of the Companies Act 1965 on the respondent, depending as it was under the presumption as to the

A inability of the respondent to pay its debts. The applicant urged the court through its counsel to defer making an order on the intended withdrawal of the petition until the applicant should be in a position to show that the requirements of s. 218(2)(a) for the presumption to arise have been satisfied. At p. 531, Abdul Aziz J
B (as he then was) stated as follows:

> Where the case of an intending petitioner depends on the presumption under s. 218(2)(a) for proof of the debtor company's inability to pay its debts, the petitioner would have no case to bring until the presumption has arisen after the statutory notice
C has been issued and served and the company has, for three weeks, failed to satisfy the demand of the statutory notice. Until the presumption arises, the intending petitioner would have no cause of action to be qualified to present a petition. It must follow that he would have no cause of action to qualify to be substituted
D as a petitioner under r. 33(1) ...

[22] At p. 532 His Lordship expressed some doubt as to whether the definite article 'the' was intentional or whether it should instead be 'a petition'. His Lordship expressed it thus:

E > The crucial words of r. 33(1) for present purposes are 'any person who ... would have a right to present **the** petition'. *I wonder whether the definite article 'the' is intentional or whether it should instead be 'a petition', because if 'the' is intentional, then 'the petition' actually refers to the petition that is sought to be withdrawn and*
F *the interesting question would then arise as to when a person who intends to be a substitute petitioner can be said to have a right to present the petition that is sought to be withdrawn.* The question, however, was not taken up in the brief submission, which did not pay regard to the point, it being, perhaps unconsciously, assumed that 'a petition' was intended. (emphasis added).

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[23] His Lordship felt that he could resolve the matter by considering the following at p. 532:

> The only concern on my part, is, therefore, whether the words 'would have', in relation to a right to present a petition, indicates
H a future qualification. If they are intended to indicate futurity, that would be the only justification for learned counsel for Cutler-Hammer's urging that an order on the withdrawal be deferred until they qualified under s. 218(2)(a). In my opinion those words do not indicate futurity. **Whether Cutler-Hammer would have**
I **the right to present a petition will have to be decided as of the moment**.

Learned counsel for Cutler-Hammer cited the Privy Council's judgment in *Perak Pioneer Ltd v. Petroliam Nasional Bhd* [1986] 3 WLR 105 at p. 112C-G, where the Privy Council analysed r. 33 of the Companies (Winding-up) Rules of Hong Kong, although not identical, corresponds with our r. 33 where the right of the intending substitute to present is expressed to be 'a petition'. The Privy Council in that case were not concerned with the question whether substitution could be ordered where the party seeking substitution would not have a right to present a petition until sometime in the future but whether it could be ordered where the party seeking substitution was not a creditor when the existing petition was presented. The judgment, therefore, does not assist Cutler-Hammer. I do, however, find some support there for what I have said about the words 'would have'. From the passage at p. 112 G, *it may be understood that since the party seeking substitution had a right to present the petition at the date when substitution was sought, he qualified as a person who 'would have a right to present a petition'.*

For the reasons that I have given, I do not think I ought to defer making an order on the withdrawal of this petition to enable Cutler-Hammer to issue the statutory notice and qualify for the benefits of s. 218(2)(a). (emphasis added).

[24] It can fairly be said that His Lordship Abdul Aziz J (as he then was) was prepared to consider whether the applicant would have a right to present a/the petition as at the date of the substitution for otherwise there would have been no need to consider if the expression "would have" could refer to some time in the future after the expiry of the statutory notice period of three weeks. His Lordship could then easily have decided the matter the same way by saying that the applicant could not in any event have been able to present the petition when it was presented by the original petitioner.

[25] However there are also cases from our courts that say quite affirmatively that the test is whether the applicant asking to be substituted would have been able to present the petition was at the point when the original petitioner first presented the petition.

[26] In *Bank Industri & Teknologi Malaysia Bhd v. Alom Building Systems Sdn Bhd* [2006] 3 CLJ 506; [2006] 5 AMR 334, the brief facts giving rise to the same issue are as follows at pp. 334-335 of the headnotes:

HSBC Bank Malaysia Bhd (the original petitioner) which had presented a winding-up petition (the petition) against the respondent, *withdrew the petition on the date of hearing on the ground*

A *that it had been fully paid the amount owing to it. Bank Industri & Teknologi Malaysia Bhd (Bank Industri) which had filed a notice of intention to appear at the hearing of the petition and to support it then applied orally to be substituted as the petitioner.* The respondent was not present on the date of hearing of the petition. The substitution
B was allowed pursuant to rule 33 of the Companies (Winding-up) Rules 1972 (the Rules) on the terms, *inter alia*, that Bank Industri do file an amended petition within 14 days from the date of substitution and reserve the same on the respondent in accordance with the Rules.

C The respondent, via separate applications, applied to set aside the order of substitution and to set aside the service on it of the amended petition. *The respondent contended, inter alia, that Bank Industri did not have the right to be substituted as the petitioner under rule 33 of the Rules, on the date of hearing of the petition as it was not a judgment creditor as at the date of commencement of the original*
D *winding-up proceedings i.e. November 10, 2004 since it had only obtained judgment against the respondent on February 1, 2005. The respondent argued that the facts relied upon by Bank Industri as forming the basis of its application for substitution must have existed at the date of commencement of the original petition and not subsequently as in this*
E *instance.*

The respondent also contended that a statutory notice pursuant to s. 218(2)(a) of the Companies Act 1965 was never served on it and that the presumption of inability to pay a debt thereunder, as relied upon by Bank Industri, only arises after such a notice has
F been served and is not complied with. (emphasis added).

[27] On the interpretation of r. 33 of the Companies (Winding-up) Rules 1972 His Lordship Clement Skinner J (as he then was) observed at p. 340:

G In my judgment for the court to exercise the discretion which it has to order a substitution under the rule, it must be satisfied that the person who seeks to be substituted is a person who "would have a right to present the petition".

H So, was Bank Industri a person who would have a right to present the petition in this case? In considering this question I accept the preposition made by both Mr Albert Tang of counsel for the substituted petitioner and Ms Daisy Tham of counsel for the respondent, that *the words "would have a right to present the petition" refer to a right to present the particular petition at the time it*
I *was presented, and not at the date the substitution is ordered. Put in another way, the person applying for substitution must be a person who would have had the right to present a petition at the time the original petition was presented.* To me that represents the correct position

because if a winding-up order is eventually granted, the order relates back to the date when the petition was first presented because s. 219(2) of the Act stipulates that "winding-up will be deemed to have commenced at the time of the presentation of the petition for the winding-up". Therefore the person who wishes to be substituted as a petitioning creditor must show that at that date he would have had a right to present the petition. (emphasis added).

[28] The case of *Bank Industri & Teknologi Malaysia Bhd* (*supra*) above was followed in *Teoh Vin Sen v. True Creation Sdn Bhd* [2008] 4 CLJ 393 at p. 398; [2008] 5 MLJ 311 where His Lordship Ramly Ali J (now FCJ) observed at pp. 317-318 as follows:

Rule 33(1) gives the discretion to the court to substitute as petitioner any person who would have a right to present the petition and who is desirous of proceeding with the petition. The word 'the petition' in r. 33(1) refers to the earlier petition filed by the petitioner. The intending petitioner must be some one who has the right to present the earlier petition (see *Bank Industri & Teknologi Malaysia Bhd v. Alom Building Systems Sdn Bhd* [2006] 4 MLJ 405). Rule 33(1) is silent as to when the intending petitioner must have that 'right' to present the said petitioner: Is it at the time when the earlier petition was presented or filed, or is it at the time when the application for substitution was filed?

The real position of law as to the right of the applicants to substitute the petitioner is not that they must have the right to present the petition at the date when the substitution is sought as submitted by them but the applicants must have the right to present the petition at the date when the petition is presented by the earlier petitioner which is on 30 October 2006.

The court is of the view that the above proposition represent the correct position of the law because *if a winding up order is eventually granted, the order relates back to the date when the petition was first presented by the earlier petitioner, because s. 219(2) of the Companies Act 1965 stipulates that 'winding up will be deemed to have commenced at the time of the presentation of the petition for the winding up ...'*. Therefore, the applicant who is desirous of proceeding with the petition must show that at the time of the first presentation of the petition by earlier petitioner, he would have had a right to present the said petition.

In the present application, the winding-up petition was first presented by the earlier petitioner (Teoh Vin Sen) on 30 October 2006. The judgment obtained by the applicants *vide* Civil Suit No: S4-22-181 of 2003 was only granted on 17 January 2007

A (more than two months after the petition was first presented). *The judgment has not crystallised yet at that time as damages need to be assessed and costs to be taxed. Only on 31 May 2007, the court taxed the costs and after review on 16 August 2007, the costs were finally fixed at RM37,956.50. (almost ten months after the petition was presented)*.

B The above facts clearly show that at the time when the petition was presented on 30 October 2006, the applicants were not creditors to the respondent and therefore have no right to present the said petition against the respondent.

C The first issue that needs to be determined in an application for substitution under r. 33(1) is the status of the applicant. If the judgment obtained or the crystallisation of debt occurred well after the date of presentation of the winding-up petition, then the applicant's right to rank as creditor for the purpose of r. 33(1) cannot be considered (see *Morgan Guaranty Trust Co of New York* D *v. Lian Seng Properties Sdn Bhd* [1989] 3 MLJ 172). (emphasis added).

[29] The English Insolvency Rules 1986/1925 makes it clearer with respect to the opening sentence which plainly refers to what E was subsequently found in point of time with respect to the original petitioner not having a right to present the petition originally filed. Rule 4.19 of the Insolvency Rules 1986/1925 reads:

4.19 - Substitution of creditor or contributory for petitioner

F (1) This Rule applies **where a person petitions and is subsequently found not entitled to do so**, or where the petitioner:

(a) fails to advertise his petition within the time prescribed by the Rules or such extended time as the court may allow, or

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(b) consents to withdraw his petition, or to allow it to be dismissed, consents to an adjournment, or fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing, or on a day to which it is adjourned, or

H

(c) appears, but does not apply for an order in the terms of the prayer of his petition.

(2) The court may, on such terms as it thinks just, substitute as petitioner any creditor or contributory who in its opinion would I have **a right to present a petition, and who is desirous of prosecuting it**. (emphasis added).

[30] It is more than a compelling argument to say that the said debt having been absolutely assigned to Jadeline by the petitioner, the effect under the law is that all rights to present the petition would now be with Jadeline. Jadeline too would be vested with the full right to proceed with the petition. The respondent would have no cause to complain and in fact it did not for it did file any affidavit to oppose the substitution. All that has changed would be for the respondent to pay to Jadeline the self-same debt in full settlement of its previous indebtedness to the petitioner. It must be noted that one is not dealing with a different debt but the same said debt.

[31] In *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231; [1984] 2 MLJ 268 at p. 269 it was held:

> Looking at the whole document of February 18, 1978 and bearing in mind the provision of section 6 of the Act, in our opinion, the document was an absolute assignment and not purporting to be by way of charge only within the meaning of section 4(3) of the Civil Law Act 1956. The assignment was in terms absolute in the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights title and interest in the Sale Agreement dated April 1, 1977 and the remedies of enforcing them. ... If the assignment was an absolute one (not purporting to be by way of charge only) the fact that it had the effect of passing to the assignee the rights title and interest of the assignor in the Sale Agreement and the beneficial interest of the assignor in the said property under the said Sale Agreement by way of security only did not derogate from the absolute character of that assignment ...

[32] Even if it is doubtful if Jadeline has a right to apply for substitution under r. 32 of the Companies (Winding-up) Rules 1972, one may also look at O. 15 r. 7(2) of the Rules of Court 2012 ("ROC"). It reads:

> Where at any stage of the proceedings in any cause or matter **the interest or liability of any party is assigned or transmitted to or devolves upon some other person**, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, **order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party**. (emphasis added).

[33] Lest it be said that the ROC has no application in a winding-up proceeding, one can refer to the Court of Appeal case of *Fairview Schools Bhd v. Indrani Rajaratnam & Ors* [1998] 1 CLJ 285; [1997] 4 AMR 4113 where the proposed interveners filed an application for leave to intervene in the appeal. As there was nothing in the Companies (Winding-up) Rules 1972 permitting intervention the issue before the Court of Appeal was whether the then Rules of the High Court 1980 ("RHC") were irrelevant. If so, then the proposed intervener's application would be unsustainable. One must hearken to the words of wisdom of His Lordship Mahadev Shankar JCA at p. 307:

> ... Consequently we think that where the Winding-up Rules make specific provision for a particular matter it would exclude a parallel provision in the rules of the court but where the Winding-up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exist. If not it can always resort to Order 92 r. 4 of the RHC.

[34] One may use the analogy of a vesting order which may be broader in scope and immediate effect when compared to an absolute assignment. Whilst in an absolute assignment, a substitution is necessary from the date the assignment comes into effect, in a vesting order under the Banking and Financial Institution Act 1989 it is automatic though on an abundance of caution, a party having the vesting order in its favour may still apply for the relevant substitution of party.

[35] In that sense the Court of Appeal case of *Mohamed Tawfik Tun Dr Ismail v. HLG Credit Sdn Bhd & Anor* [2012] 2 CLJ 65; [2012] 2 MLJ 626 is very instructive both in the context of an absolute assignment as well as in a substitution of the assignee at the creditor's petition stage in a bankruptcy proceeding. The brief facts as narrated by His Lordship Ramly Ali JCA (now FCJ) are as follows at pp. 632-633:

> [2] On 26 February 1999, the first respondent obtained a judgment against the appellant at the Kuala Lumpur High Court *vide* Civil Suit No D2-22-476 of 1998. On 11 October 2004, the first respondent filed a bankruptcy notice ('BN') against the appellant at the Johor Bahru High Court *vide* Bankruptcy Suit No 29-3033 of 2004 based on the above judgment. On 17 March 2005, the first respondent filed a creditor's petition ('CP').
>
> [3] In the meantime, while the CP was still pending in court, all rights of the first respondent in respect of the appellant's indebtedness under the judgment were assigned to the second

respondent; *vide* a deed of assignment dated 24 September 2005. Notices of the assignment dated 23 September 2005 and 11 October 2005 were given to the appellant. A

[4] On 1 December 2005, the first respondent filed an *ex parte* application (encl 16) seeking an order to substitute the second respondent as the judgment creditor in the said bankruptcy proceedings. The said *ex parte* application was allowed on 26 July 2006. B

[5] The appellant then filed an application to set aside the *ex parte* order dated 26 July 2006. The said application was allowed by the learned SAR on 16 May 2007. On 24 May 2007, the first respondent filed an appeal to the judge in chambers against the SAR order dated 16 May 2007. The learned judge allowed the said appeal that the said order dated 16 May 2007 made by the learned SAR was set aside and directed the first respondent's application dated 1 December 2005 (encl 16) be reheard *inter partes*. C D

[6] Upon rehearing encl 16, the learned SAR had, on 28 January 2010, allowed the application with costs and further ordered that the second respondent be substituted as the judgment creditor in the pending bankruptcy proceedings. The appellant's appeal to the judge in chambers against the decision of the learned SAR dated 28 January 2010 was dismissed with costs on 5 August 2010. Hence the present appeal before this court. E

[7] The application in encl 16 was a straightforward application by the first respondent on the ground that as the judgment debt, which is the basis of the bankruptcy proceedings, had been absolutely assigned by the first respondent to the second respondent, therefore the second respondent should be cited as the judgment creditor in the said proceedings. F

[36] Having found that the assignment was an absolute assignment, His Lordship Ramly Ali JCA (now FCJ) argued as follows in favour of substitution at pp. 635-636: G

[19] Being a valid and absolute assignment, it can be enforced by the assignee (the second respondent) in a court of law, including the bankruptcy court, as in the present case. The second respondent is therefore entitled to be substituted as the judgment debtor in place of the first respondent in the present bankruptcy proceedings. H

[20] The same issue was dealt with by the Court of Appeal in the case of *Dato' Fathi bin Hj Ahmad v. Standard Chartered Bank Malaysia Bhd* [2006] 2 MLJ 454; [2006] 1 CLJ 273. In that case, by virtue of s. 50 of the Banking and Financial Institutions I

Act 1989, the assets of the judgment creditor, who was the Standard Chartered Bank, were assigned (by way of a vesting order) to Standard Chartered Bank Malaysia Bhd ('SCBMB'), who then applied by summons to amend the creditor's petition and substitute SCBMB as the judgment creditor in place of Standard Chartered Bank in the pending bankruptcy proceedings (after BN and CP had been issued). With the vesting order all judgments obtained by Standard Chartered Bank were assigned to the newly incorporated Standard Chartered Bank Malaysia Bhd (SCBMB). In opposing the application the judgment debtor in that case contended that the application by SCBMB was to substitute another party to replace the judgment creditor and was not allowed under the Bankruptcy Act or the Bankruptcy Rules.

[21] The objection by the judgment debtor was dismissed by the Court of Appeal. The court held that 'it was only appropriate for the respondent (SCBMB) to amend the petition by substituting the name of Standard Chartered Bank Malaysia Bhd for Standard Chartered Bank because of the vesting order'. The court also held that rr. 274 and 276 of the Bankruptcy Rules 1969 would justify the amendments.

[37] Incidentally r. 276 of the Bankruptcy Rules 1969 reads thus:

276. Rules of the High Court applicable in event of lacunae

In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, *mutatis mutandis*.

[38] His Lordship concluded as follows:

[22] The facts in Dato' Fathi bin Hj Ahmad case and the present case before this court have something in common: ie **both involve the status and effect of valid absolute assignments as a basis to substitute the judgment creditor in pending bankruptcy proceedings and the same nature of applications**. In that case, the assignment was valid under s. 50 of the Banking and Financial Institution Act 1989; **while in the present case, the assignment was valid under s. 4(3) of the Civil Law Act 1956**. Eventhough their validity is based on a different set of laws, their legal effect is still the same, ie an absolute assignment is validly created. Therefore, **it is only appropriate for the respondents in the present case to be accorded the same entitlement in law to substitute the assignee as the judgment creditor in the pending bankruptcy proceedings**. (emphasis added).

[39] On the issue of whether the second respondent assignee was entitled to present the creditor's petition for at the point when the original petitioner in the first respondent presented the creditor's petition, the assignee was not a creditor yet, His Lordship reasoned as follows at pp. 638-639:

> [32] The appellant also raised the issue that by reason of his failure to obtain leave of court to enforce the judgment, the second respondent cannot be said to be a person who is 'for the time being entitled to enforce a judgment' within the meaning of the proviso to s. 3(1)(i) of the Bankruptcy Act 1967. In short, the appellant was saying that the second respondent was not a creditor. The appellant argued that before a judgment creditor may issue a bankruptcy notice based on a judgment against a judgment debtor, the judgment creditor must satisfy the criteria stipulated in the provisions of the proviso to s. 3(1)(i) of the Act, which reads:
>
> > Provided that for the purpose of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order.
>
> [33] We are not in agreement with the appellant on this point. As stated earlier in this judgment, the deed of assignment in question was a legally valid absolute assignment under s. 4(3) of the Civil Law Act 1956. Any absolute assignment of any debt of which notice in writing has been given to the debtor or other person from whom the assignor would have been entitled to receive or claim the debt is effective in law to pass and transfer the legal title to the debt to the assignee. In this case, cl. 1 of the said deed of assignment provides that 'all the assignor's title and interest in the said Debt together with the right to recover and receive payment of the said Debt as well as the benefit of all and any security or collateral given by the Defendant …; the benefit and advantage of the judgment … but not limited to the right to pursue and/or proceed and/or continue with the said action against the Defendant' were absolutely assigned to the assignee. In cl. 2, the assignee had agreed 'to proceed with the Action in the name of the Assignee and to execute all papers necessary for the continuation of the said Action and to receive the benefit of the same whether in settlement, judgment, foreclosure, sale, surplus monies, proceedings, bankruptcy or otherwise'.
>
> [34] On that basis, the second respondent (as the assignee) is clearly 'a person who is for the time being entitled to enforce a final judgment or final order and shall be deemed to be a creditor

who has obtained a final judgment or final order' as stipulated under the proviso to s. 3(1)(i) of the Bankruptcy Act 1967. Thus the appellant's contention on this issue holds no water and accordingly falls.

[35] Giving the words of cl. 1 and 2 of the deed of assignment its ordinary meaning the learned judicial commissioner was right in holding that the said assignment was an absolute assignment within the meaning of the provisions of s. 4(3) of the Civil Law Act and not a partial assignment as contended by the appellant. The costs awarded under the final judgment formed part of the subject matter of the assignment. That in law, the second respondent is entitled to be substituted for the first respondent as the judgment creditor in the pending bankruptcy proceedings against the appellant.

[40] By the same token, Jadeline is entitled to be substituted as the petitioner in the pending winding-up petition against the respondent. Indeed cl. 2 of the deed of assignment on "Substitution" specifically provides that upon the execution of the deed of assignment, the assignee shall at its own costs apply to be substituted as the petitioner in place of the assignor in the winding-up petition.

[41] One is conscious of the fact that a winding-up order when granted would relate back to the date of filing of the petition under s. 219(2) Companies Act 1965. That seems to be the rationale behind the argument that under r. 33 Companies (Winding-up) Rules 1972 that the petitioner sought to be substituted must have the right to present the petition as at the date of the first petition. However the same is true too of an order making a debtor a bankrupt. Section 47(1) of the Bankruptcy Act 1967 reads:

47. Relation back of Director General of Insolvency's title

(1) **The bankruptcy of a debtor**, whether the same takes place on the debtor's own petition or upon that of a creditor, **shall be deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which a receiving order is made against him**, or if the bankrupt is proved to have committed more acts of bankruptcy than one to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within six months next preceding the date of the presentation of the bankruptcy petition.

(2) No bankruptcy petition, receiving order or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor. (emphasis added).

[42] Just as the relation back principle in a bankruptcy order does not prevent the substitution of an assignee for an assigned debt in a bankruptcy petition after an act of bankruptcy has been committed, the same principle should not present any impediment to the substitution of an assignee for an assigned debt in a winding-up petition for it is the same debt that the respondent is being adjudicated a bankrupt or being sought to be wound-up as the case may be as was done in *Mohamed Tawfik*'s case (*supra*).

[43] The Privy Council in *Perak Pioneer Ltd* (*supra*) made this pertinent observation at pp. 857-858:

... Suppose that for *bona fide* commercial reasons one finance house acquires the undertaking of another finance house. By the nature of its business the transferor finance house is likely to have a number of debts owing to it at the date of the transfer. Suppose that some of these are overdue debts owing by companies against whom the transferor finance house has presented winding up petitions in the ordinary course of collecting the money's due to it. Their Lordships ask themselves *what possible reason there could be for requiring the court to dismiss all such petitions (in the absence of another creditor seeking substitution) so that costs are thrown away, the transferee finance house has the pointless burden of presenting new petitions based on the same debts, and furthermore may be prejudiced as a result of the postponement of the commencement date of the winding up* ... (emphasis added).

[44] Admittedly a vesting order under BAFIA is broader in scope and immediate in effect compared to an absolute assignment as can be seen in Leong Moh Sawmill Co Sdn Bhd (In Liquidation) where the issue is whether a foreign bank, the Standard Chartered Bank ('the predecessor bank') can continue to pursue matters relating to foreclosure proceedings in its name after it had already sold all its banking business in Malaysia to Standard Chartered Bank Malaysia Bhd ('the successor bank') pursuant to a vesting order made under s. 50(1) of BAFIA. In view of the expression in s. 50(3), Siti Norma Yaakob JCA (later CJ (M)) held, *inter alia*, as follows at p. 753:

(a) the vesting order was such that there was no requirement for a formal order of substitution under O. 15 r. 7(2) of the Rules of the High Court 1980;

A (b) the successor bank was deemed to be a party in all proceedings initiated by or commenced against the predecessor bank; and

(c) the transfer of any property or business pursuant to the vesting order shall from the transfer date become vested in or B held by the transferee ie a transmission of interest from one legal entity to another.

[45] I would hold that Jadeline has the right to be substituted as petitioner in place of the present petitioner whether under r. 33 C of the Companies (Winding-up) Rules 1972 or alternatively under O. 15 r. 7(2) ROC.

Whether AmBank Should Be Substituted As Petitioner In The Circumstances Of The Case

D **[46]** AmBank's statutory notice under s. 218(1)(e) and (2)(a) had been issued on 17 December 2012 which is after the petition has been presented on 22 August 2012. It had obtained summary judgment for US$1,630,944 pursuant to an outward bills purchase (OBP) facility on 24 October 2013. It had filed a notice of E intention to support the petition on 15 May 2013. At the time when Jadeline sought to be substituted as petitioner on 20 June 2013 when it filed the notice of motion, I had no doubt that AmBank was more than capable and have the necessary *locus* to file a/the petition if it had wanted to; the presumption of the F inability of the respondent to pay the debt having arisen after the expiry of three weeks from the service of the said statutory notice under s. 218(1)(e) and (2)(a).

[47] Therefore if one were to take the relevant date as the date G of applying for substitution by Jadeline on 20 June 2013, AmBank would more than qualify under r. 33 of the Companies (Winding-up) Rules 1972 for by that time AmBank had already been armed with a judgment of the court and the debt can no longer to be said to be still a *bona fide* disputed debt.

H **[48]** However it was argued by learned counsel for Jadeline that the relevant date for AmBank in its application to be substituted as a petitioner would be the date when the petition was first presented by the original petitioner. Perhaps it was an argument I triggered by the fact that learned counsel for AmBank, Mr Koh Yew Chong, had submitted that as at the date of the filing of the original petition the said debt had not been assigned by the

original petitioner to Jadeline yet and so Jadeline could not have been substituted as the petitioner. It sounded like a "what I cannot have, you must not have as well", type of argument!. A

[49] Taking the relevant timeline a bit further back to the presentation of the original petition, the question is whether AmBank could have presented the petition at that point in time. It is true that the statutory notice seeking to invoke the presumption of debt was issued later than the filing of the original petition. However it must not be forgotten that the ground is the same which is the inability of the respondent to pay its debt. As can be seen in AmBank's writ and statement of claim filed on 16 January 2013, AmBank had agreed to grant a facility of RM37.5 million to the respondent *via* various letters of offer and also *via* a facility agreement dated 18 January 2011. It consisted of an overdraft facility of RM3 million, a term loan facility of RM1.5 million and the rest being various multi-trade facilities of varying amounts. I have no doubt that that makes AmBank a contingent creditor of the respondent and at any rate AmBank is at liberty to show to the court that the respondent is insolvent and unable to pay its debts by not relying on the statutory notice but by showing to the court that the respondent in this case is hopelessly insolvent. In fact as can be seen in the validation order application by another company Halycon Agri (M) Sdn Bhd, who had paid RM63 million to its solicitors to purchase the entire business of the respondent consisting rubber factories, its lands and its license, that was all that could be salvaged of the respondent. There is little doubt that even the various secured creditors in the banks could not be paid in full, let alone any amount remaining to be shared *pari passu* among the unsecured creditors. B C D E F G

[50] This court shall also take cognisance of the fact that a presentation of a winding-up petition by a creditor against a borrower would trigger a default against a bank lender, and the bank would be entitled to recover the whole of the facility granted to the borrower in this case. H

[51] In *Bank Industri & Teknologi Malaysia Bhd*'s case (*supra*), His Lordship Clement Skinner J (as he then was) observed at pp. 341-342 as follows: I

> The respondent says that since Bank Industri only obtained its judgment on February 1, 2005, it would not have had a right as such "judgment creditor" to present its petition on November 10,

2004 which was the date the original petition was presented. I do not agree. It is not only a "judgment creditor" who may present a winding-up petition against a company. **Section 217(b) of the Act makes it very clear that any creditor, including a contingent or prospective creditor of the company may present a petition to wind-up a company**. Here, it is my view that Bank Industri was clearly a creditor of the respondent. By July 31, 2004 the respondent was already indebted to it for RM906,898 under the facility agreement dated May 23, 2001. Further by October 20, 2004 Bank Industri had already filed a writ of summons against the respondent claiming the repayment of the liquidated amount of RM906,898. There is no evidence that the debt was genuinely disputed on substantial grounds.

Accordingly, at the date when the petition was originally presented, Bank Industri was, in my view, a person coming within the meaning of a creditor in s. 217(b) of the Act, and in any event it was a contingent and prospective creditor of the respondent. So there was no reason why Bank Industri would not have had a right to present the petition on the date it was originally presented. (emphasis added).

[52] His Lordship had earlier referred to s. 217 of the Companies Act 1965 on who is entitled to present a petition to wind up a debtor company. It reads:

217. Application to wind-up

(1) A company whether or not it is being wound-up voluntarily may be wound up under an order of the court on the petition of:

(a) the company;

(b) any creditor, including a contingent or prospective creditor of the company;

(c) a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the Official Assignee of the state of a bankrupt contributory;

(d) the liquidator;

(e) the Minister pursuant to section 205 or on the ground specified in section 218(1)(d);

(f) in the case of a company which is a licenced institution, or a scheduled institution in respect of which the Minister charged with responsibility for finance has made an order under section 24(1) of the Banking and Financial Institutions

Act 1989, or a non-scheduled institution in respect of which such Minister has made an order under section 93(1) of that Act, Bank Negara Malaysia;

(g) in the case of a company which is licenced under the Insurance Act 1996, Bank Negara Malaysia;

(h) the Registrar on the ground specified in section 218(1)(m) or (n), or any two or more of those parties. (emphasis added).

[53] The case of *Teck Yow Brothers Hand-bag Trading Co v. Maharani Supermarket Sdn Bhd* [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 is illustrative of the fact that there is nothing preventing a creditor from presenting its petition to wind up a debtor company on ground of its inability to pay its debts without relying on the presumption in the statutory notice if the evidence is so clear that the debtor is in any event insolvent. It was held as follows at pp. 557 to 558:

After hearing arguments I came to the conclusion on the facts before me that the sole issue is whether Maharani is unable to pay its debt and therefore should be wound-up. On such examination of the facts **the evidence is overwhelming that the respondent Maharani is unable to pay its debt**. I find as a fact that the petitioner has proved to my satisfaction that Maharani was unable to pay its debt and in so determining **I am allowed to do so by taking into account the contingent and prospective liabilities of the company Maharani**. As has rightly been pointed to by the petitioner's Counsel as per encl. (63) Maharani's debt according to the list of supporting creditors amount to RM100,000. To this must be added the amount he owed the opposing creditor his landlord to RM40,000. The distress realised only RM61,000. Because of this amount it has never been really disputed by the opposing creditor that Maharani is insolvent but what the objection consists of is that there was sufficient to pay Ban Heng Hong and by that yardstick Maharani is able to pay its debt and we shut our eyes to the other creditors in the list. To take that view is in my view unreasonable and unjust.

As for the contention that no proper notice under s. 218(2)(a) of the Act has been given I find in this case that the notice is in the circumstances unnecessary and I order that it be dispensed with as the petition is not wholly founded under s. 218(2)(a) of the Companies act. I am of the view that s. 218(2)(a)(b) and (c)are mutually exclusive and on the facts and in the exercise of its discretion a company can be wound up by the Court on any of the grounds (a), (b) or (c). (emphasis added).

[54] While s. 218(1)(e) provides that a company may be wound up on ground of its inability to pay its debts, s. 218(2) provides the following deeming provision as follows:

> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
>
> (b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) **it is proved to the satisfaction of the Court that the company is unable to pay its debts**; and in determining whether a company is unable to pay its debts **the Court shall take into account the contingent and prospective liabilities of the company**. (emphasis added).

[55] Here the respondent debtor has not filed any affidavit to seriously dispute that it is indebted to AmBank for the debt claimed or that it is not insolvent and has sufficient assets when realised to pay the debt or that the debt is being *bona fide* disputed.

[56] I thus hold that AmBank is entitled to be substituted as a party.

Whether Both Jadeline And Ambank May Be Substituted As Petitioner To The Petition

[57] Since both have a right to be substituted, should the court determine who should be substituted by reference to who had filed the application for substitution first or whose debt is bigger? If the first criterion is chosen then it would be Jadeline. If the second is chosen then it would be AmBank.

[58] Counsel could not point to any authorities one way or the other though both wanted their client to be the sole petitioning creditor. Neither can they point to any case law to show that the

court cannot join both as co-petitioners for two different debts. I think one can fairly proceed on the principle that whatever is not prohibited is permitted. It would be reasonable to assume that if it is so abhorrent to the notion of fair play and justice for there to be two petitioners or more, then parliament would have legislated so. I do appreciate however where in cases of more than one petitioner, it is generally for a debt arising out of the same judgment for instance.

[59] AmBank also raised the fact that the registered office of Jadeline is the same as that of the respondent and that Jadeline may not be a *bona fide* creditor. Learned counsel for Jadeline said that this was a typographical error. Whether this error is more of a Freudian slip or a faultless stumble is left to be seen. The natural fear of AmBank was that Jadeline, if substituted, may strategically not pursue the winding-up with all due diligence and with the urgency expected of them. That fear can be addressed shortly.

[60] At any rate I cannot see any objection on principle and if at all there is any inconvenience, it is more a point of neatness in amending the said petition.

Pronouncement

[61] In the circumstance I allowed for both Jadeline and AmBank to be substituted as petitioners in place of Allied Empire Plantations Sdn Bhd, the original petitioner. As AmBank debt is much much bigger and as it is also a secured creditor, I directed that AmBank shall take the lead where amendments of the petition are concerned. Ambank shall be named as the first petitioner and Jadeline as the Second. AmBank in taking the lead shall also do so where compliance with the need to advertise, gazette, service and other requirements of the Companies (Winding-up) Rules 1972 is concerned and that all costs shall be shared equally between both of them.

[62] With AmBank taking the lead in getting the papers ready for winding-up, there is no fear of someone else trying to delay or derail the winding-up proceeding.

[63] I made no order as to costs with respect to both the applications herein.

Postscript

[64] For completeness, it must be stated that neither Jadeline nor AmBank has appealed against the above order. This judgment is written because the 33 unsecured opposing creditors have appealed. They had not made any submissions, whether written or oral, at the hearing of both the above applications.